

February 9, 1995

Advisory Opinion 1995 - No. 1

QUESTION

The former Senate, House, and Joint Boards of Ethics decided a large number of advisory opinions under the former Code of Legislative Ethics. Which of these opinions, if any, will continue to have precedential value?

OPINION

In three areas, the Board considers the opinions of the former boards as important precedents that will help the Board decide opinions and complaints under the new State Ethics Act. The areas are: (1) the citizen-legislator opinions¹; (2) the "legislative advice and assistance" opinions²; and (3) the "improper means" opinions³. The former boards opinions in these three areas are in the appendix to this opinion.

The Board notes that some of these opinions may contain aspects that are inconsistent with the provisions of the State Ethics Act. To the extent of such inconsistency, the Board, of course, will not treat the opinions as precedents and will not follow them.

Members are also advised that the Board's precedents, including the precedents in the above three areas, will have the same role as judicial precedents have in the judicial branch. This means that in a similar case arising in the future and involving the same principle as was invoked in a prior opinion, the Board will give the prior opinion considerable weight in its deliberations and, absent strong argument to the contrary, will follow it. Also, until the Board reverses or otherwise disagrees with a prior opinion, it means that legislators and legislative employees may view the prior opinion as indicating how the Board will decide a similar case in the future.

The Citizen-Legislator Precedents

The State Ethics Act, in RCW 42.52.020, provides that:

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or

¹ Senate Advisory Opinions 1969-No.3; 1988-No.1; and House Advisory Opinions 1970-No.2; 1986-No.2; 1987-No.1; and 1994-2.

² Senate Advisory Opinions 1969-No.1; 1969-No.3; and House Advisory Opinions 1981-No.1; 1983-No.2; 1991-No.1; and 1991-No.2.

³ House Advisory Opinions 1981-No.2; 1983-No.8; 1985-No.1; 1985-No.2; 1987-No.1; 1988-No.1; 1990-No.1; and 1991-No.2.

state employee's duties.

This broad conflict of interest provision was also contained in Joint Rule 2 of the Code of Legislative Ethics and was frequently applied in opinions of the former boards. However, the Code's version contained additional language protective of the citizen- legislator principle. That additional language provided that with respect to a legislator's voting on legislation or taking actions to influence legislation, the legislator:

does not have . . . [an] interest which is in conflict with the proper discharge of legislative duties if no benefit or detriment accrues to the legislator as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation or group.

The Board believes that this language captures the essence of the citizen legislature and that language of this nature is important for the preservation of the citizen legislature.

The State Ethics Act provides, in RCW 42.52.330, that:

By constitutional design, the legislature consists of citizen-legislators who bring to bear on the legislative process their individual experience and expertise. The provisions of this chapter shall be interpreted in light of this constitutional principle.

Because of this interpretation requirement and because of the precedential value of the prior board's decisions under the Code, the Board will interpret the broad conflict of interest rule in RCW 42.52.020 as not applying under circumstances where a member's conduct would fall under the above-quoted additional language of Joint Rule 2 that was designed to protect the citizen-legislator principle. And in cases involving the statute the Board considers the opinions of the prior boards under Joint Rule 2 as important precedents.

"Legislative Advice and Assistance" Precedents

In addition to the general prohibition of conflicts of interest in RCW 42.52.020, the State Ethics Act, in RCW 42.52.110, provides that:

No state officer or state employee may, directly or indirectly, ask for or give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the state of Washington for performing or omitting or deferring the performance of any official duty, unless otherwise authorized by law.

The former Code's Joint Rule 3(6) provided that:

A legislator shall not accept any remuneration other than legislative compensation for legislative advice or assistance.

The Board finds that the providing of "legislative advice or assistance" under this rule is an "official duty" under RCW 42.52.110. Therefore, the prior boards' opinions under the rule will continue as important precedents under that RCW section.

"Improper Means" Precedents

The State Ethics Act, in RCW 42.52.070, provides that:

Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parents, or other persons.

The former Code, in Joint Rule 4, provided that:

A legislator shall not use improper means to influence a state agency, board or commission.

The Board believes that this "improper means" provision is largely encompassed within RCW 42.52.070. Therefore, the prior boards' decisions dealing with "improper means" will continue to have precedential value.

APPENDIX

Senate Board of Legislative Ethics

Opinion 69-1, April 21, 1969

The subject senator requested an advisory opinion from the Senate Ethics Board as to whether or not certain employment which was offered to him would constitute a violation of the Code of Legislative Ethics.

He has described the proposed employment as follows:

"1. Studying, consulting and advising on the subject of adult education and the methods by which the community colleges may become more effective in presenting adult education programs within each community college district.

2. Advising the Director, staff, and Board concerning financial matters affecting the state system for community colleges, and working with the Legislative Budget Committee as it studies the financial structuring and needs of the community college system.

3. Studying relationships between the federal government and state and local governments and the community college system insofar as federally-supported programs involving community college activities are concerned. This would include obtaining funds for occupational education, adult education, student grants and loans, and related subjects.

4. Consulting with individual community colleges on methods for developing further community support and establishing liaison with key elements of the society served to obtain that support.

5. Working with legislators within each community college district, helping them to understand the role, the mission and the needs of individual community colleges and of the state system as a whole."

It is the unanimous opinion of the Board that such employment would violate the Code of Ethics in several particulars. For instance, in the fifth paragraph of the proposal he would agree to work with members of the legislature in a capacity which is actually the same capacity in which he would work with them on legislation in which he was interested during the legislative session. As such, the work would constitute "legislative advice or assistance," in the opinion of the Board, under Rules 1(a) (5) which reads:

"A legislator shall not accept any remuneration other than his legislative compensation for his legislative advice or assistance."

The same would appear to be true under paragraph 2 of the proposal, under which he would be, among other things, ". . . working with the legislative budget committee as it studies the financial structuring and needs of the community college system. . . ."

Finally, we would call attention to Rule 1(c) (2) providing as follows:

"A legislator shall not enter into any contract with a state agency involving services or property, unless the contract is made after public notice and competitive bidding. . . ."

Under a previous opinion of the attorney general the state board would be a state agency, within the meaning of that term.

For these reasons it is the Board's unanimous opinion that the proposed employment would constitute a violation of the Code of Legislative Ethics.

Senate Board of Legislative Ethics

Opinion 69-3, April 25, 1969

The following question has been presented to the Senate Board of Ethics and is considered the proper subject of an advisory opinion:

"Is it a violation of the 1969 Code of Legislative Ethics for a member of the Senate to be employed as the executive secretary of a trade association and at the same time to vote upon bills which are of particular interest to that association or its members or to act as chairman of a committee whose function includes studies and recommendations on such bills?"

In the opinion of the Board, such employment is not in and of itself a violation of the Code of Ethics; however, the nature of the association and its legislative activities, if any, or the particular facts relative to the legislator's employment may require that the member of the legislature holding the position abstain from voting on legislation of particular interest to the association or its member or from acting as chairman or participating as a member of a legislative committee during any committee deliberations or actions on such legislation. That is a question of fact in each case.

The benefits of a citizen legislature, such as we have in this state, are many. There are also built-in problems in such a legislature. Under our system a legislator is required to earn his living outside of the legislature. This brings a diversity of background and experience to legislative deliberations that is very valuable. The present case concerns itself with the extremely difficult problem of where and under what circumstances we must draw the line as to what outside employment is within defined ethical boundaries and what is not.

The following facts give rise to the question before us. The senator involved has served in several previous sessions of the legislature. In the 1967 session he was chairman of the same committee on which he now serves as chairman. He has been engaged in private business in such capacity as to give him certain management experience. In late 1968 this senator was employed as executive secretary of an association formed by certain municipal agencies pursuant to statutes authorizing such formation. The association consists of about half of the eligible agencies in the state. It has an office in Seattle managed by the executive secretary, who is answerable to a board of trustees and who serves at the will of the board. The statutory powers and duties of the association do not include the promotion of legislative interests of its members, but rather a broad field of information and promotional matters for the mutual benefit of these members.

This senator, in January, 1969, filed the disclosure statement required by statute (RCW 42.21.060), disclosing the facts with reference to his employment. At the commencement of the 1969 legislative session, he was again appointed chairman of the committee on which he had served during the 1967 session. Bills relating to the agencies who are members of the association which employs the senator are normally referred to this committee. No evidence of any understanding between the executive secretary and the association relative to any duty on his part to promote the legislative interests of the association has been presented to this Board. On the contrary, the president of the association has advised the Board in writing that no such agreement or understanding exists.

The Code of Legislative Ethics was adopted during the 1969 session of the legislature, by way of additions to the Joint Rules of the Senate and House of Representatives pursuant to RCW 44.60.070. The provisions considered by the Board to be pertinent are found in Joint Rule 1 (a) (1) as follows:

"A legislator shall not vote on or influence legislation in committee or on the floor of either house, where he has a personal interest which is in conflict with the proper discharge of his duties."

The "personal interest" which is prohibited in Joint Rule 1 is defined and clarified therein as follows:

"A legislator has a personal interest which is in conflict with the proper discharge of his duties if he has reason to believe or suspect that he will derive a direct monetary gain or suffer a direct monetary loss by reason of his official activity.

"However, a legislator does not have a personal interest which is in conflict with the proper discharge of his duties if no benefit or detriment accrues to him as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation, or group."

Similarly, Joint Rule 1 (a) subsections (2), (3) and (5) provide as follows:

"(2) A legislator shall not accept any gratuity or compensation for his services rendered in connection with his legislative employment other than his legislative salary."

"(3) A legislator shall not ask, receive, or agree to receive anything of value upon any understanding that his vote, opinion, judgment, or action will be influenced thereby."

"(5) A legislator shall not accept any remuneration other than his legislative compensation for his legislative advice or assistance."

As to Joint Rule 1 (a) (1), the employment of the legislator as executive secretary of this trade association does not in and of itself appear to constitute a "personal interest" as that term is defined by law. The state supreme court has previously held that such interest must be a financial one. In that case (*Mumma v. Brewster*, 174 Wash. 112, 24 P.2d 438 (1933)), the supreme court further held that under a statute of similar import the salaried manager of a water power company did not have a financial interest in the company which would prohibit contracts between the company and the town of which the manager was also the mayor. Furthermore, as noted previously in this opinion, the association in question is formed by and for the benefit of public agencies and is operated with public funds. For this reason, the association is not permitted to expend its funds for the promotion of the legislative interests of its members (opinion of the attorney general . . . March 4, 1969 . . .).

If the association in question in fact expended, or had authority to expend, funds for the promotion of legislation or to hire an executive secretary for that purpose, the situation would be different from the facts before this Board in this matter and on which this opinion is based. Even in the latter case, however, this Board does not believe that it is its prerogative to determine that the member is thus ineligible to serve as a member of the legislature by reason of such employment alone. The written disclosure reports that legislators are required to file by law provide the electorate and the legislature itself with information concerning the employment and holdings of individual members and that is indeed the purpose for which they are required. On the other hand, the 1969 Code of Legislative Ethics does prohibit a legislator from voting on or influencing legislation, in committee

or on the floor, where the legislator has a personal interest which is in conflict with the proper discharge of his duties (Joint Rules of the Senate and House of Representatives, Rule 1 (a) (1)).

In the opinion of the Board on the basis of the facts presented, the subject senator is not in violation of the Code of Ethics. This opinion is unanimous.

RECOMMENDATION

It is, however, the opinion of this Board that the employment of a legislator as a paid and acting executive secretary of a trade association having the promotion of legislation as one of its paramount purposes, inherently carries with it such a degree of potential impairment of independence in judgment on matters affecting the association that from the date on which this opinion is filed a legislator in such a position should abstain from voting on legislation of particular interest to the association or its members or from participating as a member of a legislative committee during any committee deliberations on such legislation or lobbying for or on behalf of such legislation. Furthermore, the acceptance of such employment on an understanding that the legislator accepting it will perform legislative services on behalf of the association may also violate subsections (2), (3), or (5), or all of them, depending upon the specific provisions of the employment agreement. This does not mean that the Senate Board of Ethics approves or recommends the holding of such employment positions by legislators in cases where lobbying is not one of the specific purposes of the association. We cannot fail to observe that members of the legislature who are employed as full-time executive secretaries of trade or professional or mutual benefit associations generally occupy sensitive and delicate positions from a standpoint of ethics. They cannot be unaware of their overall duty by virtue of their employment to promote the best interests of their respective associations, and they are compensated for doing so. In this respect there is a fundamental difference between their positions and those of others who serve as members of a part-time legislature. For this reason, the Board recommends that the Joint Legislative Board of Ethics which is charged by law with the obligation of making recommendations to the legislature on ethical matters (RCW 44.60.070(2)) give consideration to recommending more detailed rules on this subject.

Senate Board of Legislative Ethics

Opinion 88-1, March 1, 1988

Question No. 1: *Does a legislator have a conflict of interest if he or she is employed by an organization which is the only beneficiary or the only significant beneficiary of proposed legislation?*

Question No. 2: *Does a legislator have a conflict of interest if he or she is a significant shareholder in a business which is the only beneficiary or the only significant beneficiary of proposed legislation?*

Question No. 3: *Does a legislator have a conflict of interest if he or she is a significant participant in a business or other organization which is the only beneficiary or the only significant beneficiary of proposed legislation?*

For the reasons stated below, the board feels the answer to Question No. 1 is No; the answer to Question No. 2 is Yes, with certain qualifications; and that there are insufficient facts to render an opinion with respect to Question No. 3.

Senate Rule 22 provides:

"In all cases of election by the senate, the votes shall be taken by yeas and nays, and no senator or other person shall remain by the secretary's desk while the roll is being called or the votes are being counted. No senator shall be allowed to vote except when within the bar of the senate, or upon any question upon which he or she is in any way personally or directly interested, nor be allowed to explain a vote or discuss the question while the yeas and nays are being called, nor change a vote after the result has been announced."

Joint Rule 1 provides:

"A legislator has a personal interest which is in conflict with the proper discharge of legislative duties if the legislator has reason to believe or expect that a direct monetary gain or a direct monetary loss will be derived by reason of the legislator's official activity.

"However a legislator does not have a personal interest which is in conflict with the proper discharge of legislative duties if no benefit or detriment accrues to the legislator as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation or group."

If a member does have an interest which is in conflict with these rules the Washington State Constitution provides that he or she is to disclose the fact to the house of which he or she is a member and shall refrain from voting thereon (Article 2, Section 30).

RCW 44.60.010(3) defines "unethical conduct" as ". . . any conduct which constitutes a violation of any constitutional provision, statute, rule of the house or senate or joint rule prescribing standards of conduct for legislators and legislative employees."

Analysis - Question No. 1

Ethics rules are designed, in part, to assist a legislator in striking a reasoned balance between the intrinsic conflict in a citizen Legislature and conduct which is, or appears to be, lacking in good judgment or good intentions.

A citizen Legislature of part-time legislators necessarily involves employment of members in addition to legislative duties. The attendant diversity of backgrounds and experiences are vital components in a citizen Legislature. There is often a fine line of analysis separating a citizen-legislator's responsibility to fulfill the duties of the office and potential conflicts of interest. Engineers, teachers, consultants, farmers, attorneys and labor representatives are examples of professions practiced by legislative members. The fact that a particular type of employment is engaged in does not preclude active participation in measures affecting that profession so long as the legislator accrues no benefit or detriment to a greater extent than that which accrues to any other member of that profession. (Joint Rule 1)

It is often the case that a person is elected to legislative office, in part at least, through his or her affiliation with a particular profession and the expertise gathered therefrom. To rule that employment in any of these professions constitutes a conflict of interest whenever a measure of interest to that profession is presented to the legislature would be inconsistent with prior Board rulings and directly contrary to the ethics rules.

Analysis - Question No. 2

The Board feels that a legislator who is a significant shareholder in a business which would be the only beneficiary or significant beneficiary of proposed legislation would be presented with a conflict of interest if a direct monetary gain or loss would be derived by reason of the legislator's activity (Joint Rule 1).

The Board also feels that significant holdings in a business which is the object of particular legislation could present an appearance of a conflict of interest, whether or not it is clear that a direct monetary loss or gain would be derived. This would be the case, for instance, when a member held a controlling interest in a for-profit corporation which was the object of specific legislation. In such a situation the Board is of the opinion that it would be proper for the member to refrain from activity with regard to the legislation.

As a general rule the Board does not believe that a "significant shareholder" would encompass an employee who was merely a participant, along with other employees, in programs such as employee stock-options or retirement plan variations. Particular facts may dictate a different analysis.

Analysis - Question No. 3

The Board is without sufficient facts to render an opinion on potential conflict of interest when the member is a "significant participant" in a business or organization.

A member should always be mindful of an appearance of a conflict of interest and can inquire of the Board as to the particular facts of his or her situation.

House Board of Legislative Ethics

Opinion 70-2, October, 1970

Joint Rule 1 of the Senate and House of Representatives reads as follows:

"A legislator has a personal interest which is in conflict with the proper discharge of his duties if he has reason to believe or expect that he will derive a direct monetary gain or suffer a direct monetary loss by reason of his official activity.

"However, a legislator does not have a personal interest which is in conflict with the proper discharge of his duties if no benefit or detriment accrues to him as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation, or group." (Emphasis ours.)

It is the unanimous opinion of the House Board of Ethics that being an incorporator and director of a non-profit corporation does not constitute a conflict of interest as defined by the Joint Rules of the House and Senate. As an incorporator and director of a non-profit corporation, no portion of proceeds of the corporation would go directly or indirectly to an incorporator director. The object of the corporation in question is purely a non-profit venture.

The fact that a legislator is an incorporator and director of a non-profit corporation is a public record. Sponsorship of legislation designed to authorize non-profit regional housing development corporations would not constitute a conflict of interest as defined by the Joint Rules. The Joint Rules would prevent a Legislator from sponsoring, debating upon, or voting upon such legislation.

House Board of Legislative Ethics

Opinion 81-1, October 26, 1981

QUESTION: *Would it constitute "unethical conduct," as defined in the Legislative Ethics Act, for a legislator to be employed as a consultant where the services to be provided would draw upon the legislator's knowledge gained as a legislator, would involve attempts to influence the outcome of proposed legislation in other states and would be provided to an organization involved in lobbying activities in states other than Washington State?*

The answer to this question is "no." The only standards of conduct which appear to be germane to this arrangement are found in the Legislative Code of Ethics. Rule 1(a) of the Code provides, in pertinent part, that

" . . . A legislator shall not accept any gratuity or compensation for his services rendered in connection with his legislative employment other than his legislative salary.

* * *

" . . . A legislator shall not accept any remuneration other than his legislative compensation for his legislative advice or assistance."

These provisions are obviously designed to deal with a conflict of interest between a legislator's private interest and performance of official duties as a legislator. Here, there would be no conflict of interest because the legislator's private interest is concerned solely with other states and would remain unaffected by the legislator's performance of his or her official duties as a member of the Washington Legislature. The Board notes that the consulting services to be provided by the legislator would not involve any attempt to directly or indirectly influence legislation in Washington State.

House Board of Legislative Ethics

Opinion 81-2, October 26, 1981

QUESTION: *Would it constitute "unethical conduct," as defined in the Legislative Ethics Act, for a legislator to represent, for compensation, private printing firms in their negotiations with the Washington State Department of Printing where the negotiations are designed to qualify the firms for submitting bids to the Department and to procure printing contracts for the firms?*

The answer to this question is "yes." The employment relationship gives rise to an appearance of "undue influence" which the Board finds would violate Rule 1(b)(2) of the Code of Ethics. This rule provides that:

"A legislator, by himself or through others, shall not use or attempt to use improper means to influence a state agency, board or commission."

The Board notes that it was not provided with information in any way rebutting this appearance. Relevant information in this regard would show whether this kind of work would be new for the legislator; whether the legislator had particular expertise in performing the work; whether the

work would produce an incidental or major portion of the legislator's income; whether the legislator would personally negotiate with state officials; and, finally, whether the legislator was selected for the work for reasons other than the legislator's influence resulting from his or her status as a legislator.

The Board emphasizes that it believes an appearance of "undue influence" would exist because the legislator's services to be provided would be limited to negotiating with state officials. This arrangement would produce circumstances particularly conducive to the exercise of the kind of "improper means" prohibited under the above-quoted rule.

House Board of Legislative Ethics

Opinion 83-2, July 15, 1983

QUESTION: *Would it constitute a violation of the Code of Legislative Ethics, particularly Rule 1(a)(2), for a representative to have an employment relationship with an employer other than the House under circumstances where (a) the employer permits the legislator to take leave to perform his or her legislative duties; (b) the employer continues to pay the legislator his or her regular compensation while the legislator has taken such leave but deducts from the compensation the amount received in legislative salary; and (c) as a result of these special compensation provisions, the actual amount of compensation paid by the employer for the work performed by the legislator is greater than the amount paid to its other employees of the same class for the same amount of work?*

The facts contained in the hypothetical question are not sufficient to warrant a "yes" or "no" answer. Additional facts are needed to reveal whether the hypothetical conduct would or would not constitute "unethical conduct" as defined in the Legislative Ethics Act.

The Board is aware that this hypothetical question may pertain to compensation policies which have been adopted by a number of employers and which offset the salary or wage losses which their employees would otherwise sustain by reason of their assuming certain civic duties and responsibilities, such as jury service, appointment to government committees, or election to a part time government office. The stated purpose of these policies is to permit or encourage employees to exercise their citizenship rights and responsibilities by actively participating in our democratic system of government.

The Code of Ethics in Rule 1(a)(2) provides that:

"A legislator shall not accept any gratuity or compensation for his services rendered in connection with his legislative employment other than his legislative salary."

This rule is intended to prohibit, among other things, a legislator from being remunerated by his employer for his providing legislative services to the employer. Therefore, the Board concludes that the rule would be violated if there exists an express or tacit understanding that the compensation accepted by the member under the hypothetical question is for legislative services furnished to the employer.

The Board realizes the difficulty inherent in determining whether such an understanding exists. While there are a great number of possible circumstances which would tend to indicate its existence, the Board believes that particularly indicative would be: the employer's efforts to keep the policy a

secret; the employer's limiting the compensation to selected employees who belong to a certain political party or who have certain views in respect to legislative matters; the employer's failure to adopt a plausible reason, not inconsistent with the public interest, for the compensation; or the employer's failure to clearly state that the employee, when acting in his legislative capacity, is not expected to provide any special treatment or favorable decisions for the employer in exchange for the compensation.

Another prohibition contained in the Code of Ethics is germane to the hypothetical question. This prohibition is found in Rule 1(a)(4), which provides as follows:

"A legislator shall not solicit, receive, or accept a gift, favor or service under circumstances where it could be reasonably inferred that such action would influence the legislator in the discharge of his duties, or was a reward."

This rule would prohibit a member from accepting the compensation under circumstances where it could be reasonably inferred that the acceptance would influence the member in the discharge of his duties or was a reward. Similar to the previous discussion on the existence of an "understanding" in violation of Rule 1(a)(2), the Board believes that generally such a reasonable inference could arise under the facts presented in the hypothetical question if any of the following occur: if the compensation is kept secret; or if it is limited to selected employees who belong to a certain political party or who have certain views in respect to legislative matters; or if the employer has not adopted a plausible reason, not inconsistent with the public interest, for the compensation; or if the employer has not made it clear to the member that the employer does not expect the member, when acting in his legislative capacity, to provide any special treatment or favorable decisions for the employer in exchange for the compensation. This list is not meant to be all-inclusive, and there may be other circumstances which would give rise to the inference.

Since Rule 1(a)(4) only requires proof of circumstances giving rise to a reasonable inference that the undesirable influence has occurred, it is more strict than the standard contained in Rule 1(a)(2) which requires proof of the actual existence of an understanding to provide legislative services to the employer.

House Board of Legislative Ethics

Opinion 83-8, October 14, 1983

QUESTION: *Would it constitute unethical conduct for a member of the House to enter into a personal services contract with the Washington State Marine Employees Commission under which contract the member would prepare a report containing compensation information for jobs in the Marine Division of the Washington State Department of Transportation?*

The answer is "no."

The facts contained in the hypothetical question do not reveal that the employment relationship would constitute "unethical conduct" as defined in the Legislative Ethics Act. The Act, in RCW 44.60.010, defines "unethical conduct" as

". . . conduct which constitutes a violation of any constitutional provision, statute, rule of the house or senate or joint rule prescribing standards of conduct for legislators and legislative employees."

The Board recognizes the sensitive nature of the relationship which exists between legislators and state agencies with whom the legislators have personal service contracts. Rule 1(b)(2) of the Code of Ethics is germane to this relationship. This rule provides that

"A legislator, by himself or through others, shall not use or attempt to use improper means to influence a state agency, board or commission."

The limited facts contained in the hypothetical question do not, however, reveal a violation of this rule.

House Board of Legislative Ethics

Opinion 85-1, May 3, 1985

QUESTION: *Would it constitute unethical conduct for a member to make sales presentations of a commercial product to state agency officials under the following circumstances: (1) the member is president and thirty-five percent owner of the corporation on whose behalf the presentations are to be made; (2) the member's primary function as president "is divided between the establishment of a dealer network, development of a retail sales force, and presentation . . . to groups and organizations . . ."; (3) the presentations would be made to state agencies and to entities such as "the Building Owners and Managers Association, nursing home groups, apartment owners groups and similar associations . . ."; (4) the presentations would be of a technical nature but "could also involve direct sales . . ."; (5) the presentations would be made to engineers, technicians and administrators involved in purchase decisions . . ."; (6) the product is a "one of a kind", patented energy saving device which is installed on furnaces and boilers; (7) the product is offered for sale in Washington state by several competing firms, including the corporation of which the member is president and part owner; (8) the member has been in the heating and air conditioning business for a number of years; and (9) the member is vice chairman of the House of Representatives' Energy and Utilities Committee?*

For the reasons discussed in this opinion, the facts stated in the hypothetical question are insufficient to warrant a "yes" or "no" answer.

The central issue presented by this question concerns the propriety of a member's making sales presentations and sales to state agency officials. There are two major standards of ethics that apply to a member's conducting of private business with state agency officials. These standards are found in Rule 1(b) (2) of the Code of Legislative Ethics and RCW 42.21.030. They provide as follows:

Rule 1(b) (2) "A legislator, by himself or through others, shall not use or attempt to use improper means to influence a state agency, board or commission."

RCW 42.21.030 "No public official shall use his position to secure special privileges or exemptions for himself. . . ."

Whether these standards would be violated by the sales activities of the member would be determined largely by the manner in which the member conducts himself with the state agency officials. If the member does not directly or indirectly use, or appear to use, his position as a legislator, or as vice chairman of the Energy and Utilities Committee, to coerce, pressure or intimidate state officials into hearing his presentation or purchasing his product, then there should not be a violation of these standards.

In Advisory Opinion - 1981 No. 2, the board found that a member's hypothetical conduct created an appearance of "improper means" which violated Rule 1 (b) (2). In that opinion, the member's business would have been limited to representing private printers in their negotiations with the State Printer. It was this limitation feature that led the board to find an appearance of "improper means." The Board was concerned that the "arrangement would produce circumstances particularly conducive to the exercise of the kind of 'important means' prohibited under" the rule and noted that it was not furnished any information to rebut the appearance of "improper means" which would be created by the arrangement. The Board found that such information would reveal "whether this kind of work would be new for the legislator; whether the legislator had particular expertise in performing the work; whether the work would produce an incidental or major portion of the legislator's income; whether the legislator would personally negotiate with state officials; and, finally, whether the legislator was selected for the work for reasons other than the legislator's influence resulting from his or her status as a legislator."

The factual circumstances in the 1981 opinion are both similar and dissimilar to the circumstances dealt with in this opinion. They are similar because there also would exist ample opportunity for "improper means" to be used where a member makes sales presentations to agency officials. They are dissimilar because under the hypothetical question dealt with here (1) the member's business would not be limited to dealings with state officials, and (2) the member has provided the kind of detailed information which would tend to rebut an appearance of "improper means". While the question does not include information in all of the categories specified in the above quote, it does include much important information. In particular, it shows that presentations to state agency officials would constitute only a portion of the member's work; that the member has engaged in this kind of work or related work for a number of years; that he probably has substantial expertise in the line of work; and that there are other competing firms selling the same product in the state of Washington.

The Board cannot provide a definitive "yes" or "no" answer to this question because it does not have information showing how the presentations would be made and whether pressures would be applied to state agency officials to purchase the member's product. Also, while information has been provided showing that the member would have work responsibilities in addition to sales to state agencies, the Board believes that Rule 1(b) (2) and RCW 42.21.030 could very well be violated if a significant portion of the member's work or compensation would involve sales contacts by the member with state agency officials. In order to reduce the risk of violating Rule 1(b) (2) and RCW 42.21.030 and to avoid an appearance of using "improper means" to obtain favorable agency purchasing decisions, the Board would recommend that the member limit his sales contacts with state agency officials, and, to the extent possible, use other employees of the company to make personal contacts with state agency officials.

House Board of Legislative Ethics

Opinion 85-2, December 6, 1985

QUESTION: *Would it constitute "unethical conduct" for a member to contact state agency officials, for private business purposes, under the following circumstances:*

(1) The member would be vice president for marketing and public relations of a company which plans to develop a vertically integrated agricultural-industrial park having a green-house operation, cold storage operation, aquaculture operation, and a dehydration operation;

(2) In his or her capacity as vice president, the member would meet with state officials, and

arrange meetings between state officials and company employees, in order to: (a) inform state officials as to the company's operations and goals, particularly with respect to exports; (b) obtain information regarding the operations of the company (such as information pertaining to export markets and to state laws and programs applying to the company's operations), or (c) obtain assistance (not including grants or state funding assistance) in developing markets, particularly export markets, for the company's products where the assistance is provided through state economic development programs and is available to Washington businesses for the purpose of increasing markets for goods and services produced in Washington;

(3) In meetings with state officials, it would be inevitable that the member's position as a legislator sometimes would be revealed in the course of conversation, but the member would always inform the participants that the member is acting as a representative of a business, not as legislator;

(4) The service that the member would provide to the company is similar to the kind of services that the member would provide, free of charge, for a business constituent interested in economic development programs:

(5) The member serves on the following House committees: Social and Health Services, Judiciary, and Environmental Affairs;

(6) The member has considerable work background in marketing and public relations; and

(7) Only a small portion of the member's work for the company would be devoted to business contacts with state officials?

Subject to the qualifications contained in this opinion, the answer is "no."

Rule 1(b) (2) of the Code of Legislative Ethics and RCW 42.21.030 are germane to this opinion request. They provide as follows:

Rule 1(b) (2) "A legislator . . . shall not use or attempt to use improper means to influence a state agency, board or commission."

RCW 42.21.030 "No public official shall use his position to secure special privileges or exemptions for himself."

While the facts stated in the hypothetical question do not reveal a violation of these standards of ethics, still the Board believes that any private business relationship between a member and a state agency official carries with it a risk that the standards will be violated. In order to deal with this risk, it is important that the member avoid any business contact with respect to which it might be reasonable to believe that he used his position as a member of the House of Representatives in order to coerce or intimidate the official or to obtain special treatment.

In Advisory Opinion 1985 No. 1, dealing with a member's selling of energy saving devices to state officials, it was recommended that:

"the member limit his . . . contacts with state agency officials, and, to the extent possible, use other employees of the company to make personal contacts with state agency officials."

The Board makes the same recommendation here. Also, germane to this recommendation, the Board notes its approval of the question's item (7) in which the member states that contacts with state officials would constitute "a small portion" of his business work.

The Board cautions the member not to use either his legislative stationery or his legislative title in his business contacts with state officials. Use of the stationery or title would very likely violate both Rule 1(b)(2) and RCW 42.21.030. Also, use of the stationery would probably violate the ethical standard dealing with the misappropriation of public property.

In Advisory Opinion - 1985 No. 2, the Board conditionally permitted a member to make sales presentations to state agency officials under hypothetical circumstances where the items to be sold would be energy saving devices and the member would be vice chairman of the House Energy Committee. The Board believes that the facts stated in the instant question, while presenting a risk of unethical conduct, present a much lesser risk than did the facts in that advisory opinion.

House Board of Legislative Ethics

Opinion 86-2, January 9, 1987

QUESTION: *Would it constitute unethical conduct for a member to participate in the consideration of a bill - such as by advocacy for or against the bill, proposing amendments to it, and by voting for or against it in committee or on the floor - under the following circumstances:*

(1) The member is an attorney engaged in the private practice of law as an associate with a law firm.

(2) The member's law firm has represented a collection agency for many years. When this client was sued by debtors in a class action, the firm assigned the member to work on the case. The member, however, is not the attorney ultimately responsible for the client's defense.

(3) The complaint in the suit alleges that the firm's client violated state law, but also seeks declaratory and injunctive relief to find the state garnishment law unconstitutional. The county clerk is also a named defendant and the state has been brought in by the county as a third party defendant.

(4) The member did not initially anticipate that state legislative action would be a part of the lawsuit. However, he discovered that a Washington State Bar Association section subcommittee, under the direction of a University of Washington professor, was already working on revisions to the garnishment statute.

(5) The member contacted the professor in his capacity as attorney and obtained a copy of the draft which was under development for submittal to the legislature. The member discovered that the draft bill could potentially impact the litigation by mooted some of the subject matter of the suit. In his capacity as attorney, he forwarded the draft to the firm's client and to the other defendants and, in order to provide feedback to the law professor, asked for their review and comment. The member has subsequently conveyed communication back and forth on behalf of his client. All comments to the professor have been direct comments from the firm's client, conveyed under the member's cover letter. He has not conveyed personal recommendations for the draft in his capacity either as attorney or as legislator.

(6) The member's law firm has charged the client for the member's work performed on its behalf, all of which has been in his non-legislative capacity. This includes the conveying of information between the client and the law professor. The firm bills the client for his time on an hourly basis. His personal compensation is on a fixed annual basis prorated for days spent

practicing law. The member is not compensated by the firm during a legislative session. He would not represent or charge the client during the legislative session for work before the legislature.

(7) The case is currently scheduled for trial in December, 1987. Motions for class certification and summary judgment are anticipated in January of 1987. It is possible that the member will argue for a continuance on those motions, particularly on the basis that there is a possibility of legislative action in 1987 which would moot some of the underlying issues in the case.

(8) The member serves on the House Judiciary Committee. This committee is likely to consider the Bar Association draft, if it is submitted to the legislature. However, he does not know whether it will be submitted.

(9) The member believes that, as a matter of social policy, it would be beneficial for him to participate in the development of this legislation. He has acquired expertise on the constitutional issues involved and also has worked with both debtors and creditors and understands their positions. He believes that his participation in its development would be in the best interest of both debtors and creditors, as well as the general public. However, the member is sensitive to the potential for the appearance of a conflict of interest?

OPINION

For the reasons discussed in this opinion, the board believes that the answer to this question is "yes", that it would constitute unethical conduct.

Rule 1 of the Code of Legislative Ethics in pertinent part provides as follows:

"A legislator has a personal interest which is in conflict with the proper discharge of legislative duties if the legislator has reason to believe or expect that a direct monetary gain or a direct monetary loss will be derived by reason of the legislator's official activity.

"However, a legislator does not have a personal interest which is in conflict with the proper discharge of legislative duties if no benefit or detriment accrues to the legislator as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation, or group.

* * *

". . . A legislator shall not vote on or influence legislation in committee or on the floor of either house, where the legislator has a personal interest which is in conflict with the proper discharge of legislative duties."

We believe that the member would have "a personal interest which is in conflict with the proper discharge of legislative duties" if, while the bill is before the legislature, the member should engage in conduct designed to influence its content or status. It is reasonable to expect that such conduct would create a probability of enhancing the member's economic relationship with his law firm. Absent facts negating this expectation, the Board believes that this probability would constitute a "direct monetary gain" in violation of Rule 1.

The Board recognizes that in some situations, and this may be one of them, this opinion could frustrate the optimum application of legislators' expertise in the deliberative process in which bills are improved and enacted. However, on balance the Board believes that the potential harm to the public interest by a violation of Rule 1(a) outweighs that consideration.

House Board of Legislative Ethics

Opinion 87-1, June 23, 1987

QUESTION 1: *Would it constitute unethical conduct for a legislator to contact state agency employees, for private business purposes, under the following circumstances:*

1. *For the past sixteen years, the legislator has worked in the health care planning area. Years before election to the House, the legislator established a business which the legislator continues to operate and which specializes in preparing and advocating certificate of need applications on behalf of hospitals and nursing homes. Generally, the state's certificate of need program requires the approval of the Department of Social and Health Services before a hospital or nursing home can create new facilities or add onto existing facilities;*

2. *In the process of preparing and advocating a certificate of need application, the legislator will have contacts with state agency officials and employees charged with administering the certificate of need program, and will represent the applicant at agency hearings conducted on the application;*

3. *In instances where the agency denies the application, the legislator's firm may represent the applicant in an interagency appeal of the denial; and*

4. *While the legislator will not appear as an expert witness in any hearing conducted by the agency, the legislator may designate an associate to present expert testimony?*

Question No. 2

QUESTION 2: *Would it constitute unethical conduct for a legislator engaged in the business discussed in the above question to participate in the following activities:*

1. *The legislator serves on a legislative interim committee charged with studying Continuing Care Retirement Communities (CCRCs), which are retirement communities offering residents relatively independent living arrangements (such as apartments) for so long as the residents' health permits and nursing home care when the residents can no longer cope with independent living arrangements;*

2. *The interim committee probably will develop proposed financial reporting requirements for CCRCs. These requirements will be designed to protect the financial investments that residents have in their CCRCs and to decrease the risk that CCRCs will be unable to honor their contractual obligations to the residents;*

3. *Under a contract between the legislator and a CCRC, which was agreed to long before the legislator's election to the House, the legislator will prepare and advocate a certificate of need application for expansion of the nursing home facility operated by the CCRC. If new financial reporting requirements are developed for CCRCs, the legislator also will assist the CCRC in meeting these requirements?*

OPINION

With certain qualifications, the answer to the first question is that it would not constitute unethical

conduct for a legislator to engage in the hypothetical conduct. The second question does not contain sufficient information to enable the Board to determine whether the hypothetical conduct would or would not constitute unethical conduct.

Question No. 1

The question presented here is whether it would constitute unethical conduct for a legislator, under the hypothetical circumstances, to conduct a private business in which the legislator, on the behalf of private parties, prepares and advocates applications submitted to a state agency?

The standards of ethics applicable to this question are found in rule 1(b)(2) of the Code of Legislative Ethics and RCW 42.21.030. The standards are as follows:

Rule 1(b)(2) "A legislator . . . shall not use or attempt to use improper means to influence a state agency, board or commission."

RCW 42.21.030 "No public official shall use his position to secure special privileges or exemptions for himself. . . ."

These standards generally do not prevent a legislator from having private business relationships with a state agency if no attempt is made to use his or her membership in order to influence the agency or to obtain favorable treatment. Thus, in Advisory Opinions - 1985 Nos. 1 and 2, the Board decided that, under specified circumstances, a legislator may make sales presentations to state officials for the purpose of making sales to their agencies, and may arrange for meetings between state agency officials and corporate officials in order to enable the corporation to become aware of state economic development programs.

In Advisory Opinion - 1981 No. 1, the Board held that in certain circumstances where there is a strong appearance of the exercise of improper influence, a legislator's business contacts with a state agency will be presumed to violate Rule 1(b)(2). That opinion, however, deals with circumstances where a legislator's business would be limited to negotiating with state officials and where information is not provided to rebut an appearance of improper influence. Here, while the legislator's activities might well involve some negotiations with state officials, they also would involve a host of other activities, including the preparation of applications and the representation of hospitals and nursing homes in quasi-judicial proceedings before state officials.

The Board believes that any private business relationship between a legislator and a state agency carries with it a risk of violating Rule 1(b)(2) and RCW 42.21.030. This is especially true here since, under the hypothetical circumstances, the legislator specializes in preparing and advocating certificate of need applications decided by a state agency and the legislator serves on an interim committee charged with developing proposed changes which would affect the certificate of need law administered by that agency.

Because of this risk and consistent with Advisory Opinion - 1985 No. 2, the legislator should avoid any business contact with respect to which it might be reasonable to believe that the legislator used his or her legislative position for the purpose of influencing an agency official or obtaining special treatment from the official. The Board recommends that the legislator, to the extent possible, use an associate or employee of the business to make personal contacts with state agency officials, particularly contacts with the agency head or other officials whose duties include legislative lobbying and who therefore might be particularly susceptible to being influenced by the legislator's status as a legislator.

Question No. 2

This question deals with the relationship between a legislator's private business activities and participation in legislative activities.

Rule 1 of the Code of Legislative Ethics in pertinent part provides as follows:

"A legislator has a personal interest which is in conflict with the proper discharge of his legislative duties if the legislator has reason to believe or expect that a direct monetary gain or a direct monetary loss will be derived by reason of the legislator's official activity.

"However, a legislator does not have a personal interest which is in conflict with the proper discharge of legislative duties if no benefit or detriment accrues to the legislator as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation, or group.

* * *

". . . A legislator shall not vote on or influence legislation in committee or on the floor of either house, where the legislator has a personal interest which is in conflict with the proper discharge of legislative duties."

This language is designed to provide some reconciliation between the "citizen legislature" concept and the conflicts of interest that are inherent in the implementation of that concept. As is noted in the preface to the Common Sense Guide to Legislative Ethics, published by the Washington Legislature's Joint Board of Legislative Ethics:

"There is an intrinsic tension in a citizen Legislature of part time legislators. Employment outside the Legislature is not only acceptable - it is to be expected in the citizen Legislature. Yet the very expertise legislators bring to the body as a result of their outside employment contains the seeds of potential ethics violations."

Under Rule 1 of the Code of Legislative Ethics, a legislator's private financial interests in proposed legislation does not by itself bar the legislator from voting for or taking other legislative action with respect to that legislation. The code will only bar the legislator from doing so if either (1) the legislator is not "a member of any business, profession, occupation, or group", the members of which would be similarly affected by the proposed legislation, or (2) the legislator is such a member but is affected "to a greater extent than any other member of such business, profession, occupation, or group."

Here, the legislator might well be a member of a "business, profession, occupation, or group" engaged in preparing and advocating certificate of need applications. (Given the significance and extensive application of the state's certificate of need program, it is reasonable to expect that there exists a number of businesses that assist health care institutions obtain such certificates.) We are concerned, however, that the legislator's "business, profession, occupation, or group" may have very few members. We do not believe that the Code of Legislative Ethics should be construed in a manner which, in effect, authorizes a legislator to promote his or her private interests in the legislature where the justification for the authorization would be that there exist one or two other persons who would similarly benefit.

The question remaining to be answered is whether the legislator's legislative activities would affect his or her financial interests "to a greater extent than any other member of such business,

profession, occupation, or group." The Board finds that it does not have sufficient information to answer this question. The answer would depend largely on an analysis of the legislator's financial interests in the proposed legislation as compared to the financial interests therein of other members of the legislator's "business, profession, occupation, and group."

House Board of Legislative Ethics

Opinion 88-1, February 10, 1988

QUESTION 1: *Is it unethical conduct if a member, who is an attorney, or the member's law firm, brings an action on behalf of a client against the State of Washington for tortious actions or for contract violations?*

QUESTION 2: *Is it unethical conduct if a member, who is an attorney, or the member's law firm, represents a client in administrative proceedings that involve any of the following situations:*

(a) The client is a claimant for unemployment benefits before the Department of Employment Security;

(b) The client is an employer who is resisting the payment of benefits awarded to an employee by the Department of Employment Security;

(c) The client is an employer who is disputing a personnel matter with a state agency;

(d) The client is an injured party seeking workers' compensation payments from the Department of Labor and Industries;

(e) The client is seeking statutory benefits from the Department of Social and Health Services;

(f) The client is being pursued by a state agency that is seeking restitution for overpayment;

(g) The client is someone from whom the state is seeking child support; and

(h) The client is challenging a bid award by a state agency?

OPINION

Subject to the qualifications discussed in this opinion, the answer to each of these questions is "no."

Question No. 1

In this hypothetical question the Board is asked to decide whether it would constitute unethical conduct for a member, in his or her private capacity as an attorney, to sue the state of Washington on the behalf of a client. The Board also is asked whether the member's law firm may provide such legal representation.

The facts in this hypothetical question do not reveal a violation of any ethical rules. The

Board, however, would advise a member providing legal services under the circumstances specified in the question to exercise caution, because a member's private business relationship with a state agency official carries with it a risk of violating, or creating an appearance of violating, various ethical rules, including in particular the following:

Rule 1(b)(2) "A legislator . . . shall not use or attempt to use improper means to influence a state agency, board or commission."

RCW 42.21.030 "No public official shall use his position to secure special privileges or exemptions for himself. . . ."

In previous advisory opinions dealing with members' private business contacts with state agency officials, the Board has advised members to avoid contacts which might give rise to a reasonable belief that the member used his or her legislative office as a means of achieving a business purpose. See Advisory Opinions - 1985 Nos. 1 and 2, and Advisory Opinion - 1987 No. 1. The Board has cautioned against any private business contact which might be construed as using legislative office to intimidate or coerce a state agency official. Consistent with these opinions, the Board recommends in this case that the member, if possible, use an associate or partner to make private business contacts with state agency officials with whom the member has contacts in a legislative capacity. The Board does not believe it would be prudent for an attorney-member to negotiate on behalf of a client with an agency head or other agency official who engages in lobbying activities and who therefore might be particularly susceptible to being influenced by the attorney-member's status as a legislator.

The second part of this question relates to the propriety of a member's law firm suing the state on behalf of a client. This is answered by the above discussion. It does not matter whether the legal services are provided in the name of the member or the member's law firm. What matters under Rule 1(b)(2) and RCW 42.21.030 is whether the member conducts himself or herself in a manner which gives rise to a reasonable belief that the member has used his or her status as a legislator to obtain special treatment from a state official. If a member's conduct gives rise to such a belief, then the conduct would violate these ethical rules regardless of under whose name legal services are provided.

Question No. 2

This question presents an array of different kinds of administrative proceedings involving state agencies and asks whether an attorney-member can represent clients in these proceedings. With one exception, the nature of the administrative proceedings is not relevant under the rules of ethics, but what is relevant is whether the member conducts himself or herself as recommended in the answer to Question No. 1.

The one exception is in Rule 1(a)(1). This rule prohibits members from representing state employees in their claims against state agencies. While this type of proceeding is not one listed in the question, it is somewhat similar to the proceeding listed in Question No. 2, part (c), and for that reason we are noting it here.

House Board of Legislative Ethics

Opinion 90-1, May 14, 1990

QUESTION:

Would it be unethical conduct for a member to work for a personal services contractor under

the following circumstances:

(1) The contractor obtained a contract with a state agency and the member would assist in performing that contract. The contract would be completed before the next legislative session;

(2) The contract was awarded on a competitive selection basis. The contractor was one of several businesses that submitted proposals in response to the agency's request for proposals. The contractor in its proposal stated that the member would provide consulting services under the contract but only if his doing so did not conflict with the standards of ethics applicable to legislators;

(3) The terms of the contract call for the contractor to identify and analyze various alternative regulatory methods to eliminate or reduce toxic emissions into the atmosphere. The agency would rely on the contractor's work to prepare proposed regulations. The agency does not have the statutory authority to adopt regulations of this sort. The agency's intent is to submit the proposed regulations to the Legislature and request the Legislature to grant it authority to adopt them;

(4) The member, in his private capacity, would advise the contractor on the appropriateness of different regulatory approaches. He would be paid an hourly fee for his services. The member is a graduate engineer and has worked as a consulting engineer. He would rely on his expertise as an engineer in carrying out his work duties under the contract. However, he also would use his knowledge of government and public policy issues gained in part by his service in the Legislature; and

(5) The member does not serve on the standing committee having general subject matter jurisdiction over the agency or its proposed regulations. The member chairs a standing committee that has some subject matter jurisdiction over the agency but this jurisdiction does not extend to air pollution programs. The member's contractual responsibilities might require him to have contacts with agency employees, but these employees in the past have not appeared before the committee he chairs. The member would not participate in any discussions with other members regarding the proposed rules or authorizing statute?

OPINION

Subject to the qualifications discussed in this opinion, the answer to this question is "no."

The Board has issued a number of advisory opinions on circumstances involving members' private business relationships with state agencies and state officials. See: Advisory Opinions 1981 No. 2; 1983 No. 8; 1985 No. 1; 1985 No. 2; and 1987 No. 1. As indicated by these opinions, the major ethical standards applicable to these circumstances are found in Joint Rule 1(b)(2) and RCW 42.21.030, which provide as follows:

Rule 1(b)(2) "A legislator . . . shall not use or attempt to use improper means to influence a state agency, board or commission."

RCW 42.21.030 "No public official shall use his position to secure special privileges or exemptions for himself."

These standards will not be violated if a member in his or her private business contacts with state agency employees does not use or attempt to use the member's status as a legislator to influence

the state employees. There is nothing in the hypothetical question presented in this case indicating any reason to believe that the member would use or attempt to use his status for such a purpose. In reaching this conclusion, the Board is especially influenced by the following aspects of the hypothetical question: First, the services to be performed by the member are services for which the member possesses academic background and work experience. Second, the question does not reveal that the member would be selected for the position because of the assistance the member would or could provide in influencing state employees. Third, the member would go out of his way to avoid contacts with other members regarding the contract.

Our state continues to adhere to the "citizens' legislature" concept. This means that the official legislative salary is based on the assumption that legislative service is part-time in nature and that legislators will have additional sources of income. However, because of the increasing amount of time that members are expected to devote to legislative business and the uncertainty of the legislative schedule, there are relatively few employers able to employ them. The Board is aware that the limited employment opportunities for members has been a cause of economic difficulties for some members and has discouraged many citizens from running for legislative office.

Consistent with the "citizens' legislature" concept, the Board in its advisory opinions has been protective of legislators' employment opportunities. The Board has advised members that it is all right for them to have private business contacts with state agency officials and employees, but has advised them to be careful. See: 1983 No. 8; 1985 No. 1; 1985 No. 2; and 1987 No. 1. As in these opinions, the Board recommends here that, in order to reduce the appearance or risk of violating Joint Rule 1(b)(2) and RCW 42.21.030, the member limit his contacts with state employees and avoid contacts that might lead one to believe that the member was using his status as a member to influence the employees. Also, because of the nature of the member's contractual services, the Board recommends here that the member take care not to violate Joint Rule 1(a)(5), which bars a member from accepting "remuneration other than his legislative compensation for his legislative advice or assistance."

House Board of Legislative Ethics

Opinion 1991 - No. 1, April 30, 1991

QUESTION: *In this advisory opinion request, a member seeks advice with respect to whether it is appropriate, under the Legislative Ethics Act, for her to continue conducting business transactions of a certain nature. The member is the sole owner of a travel agency. The member serves on the Legislative Transportation Committee (LTC). The transactions for which she seeks advice are as follows:*

Type One Transactions: *The National Highway Users Federation contacted the member's travel agency for the purpose of providing travel arrangements for its 1989 annual convention in Hawaii. Under the agreement negotiated with the Federation, the Federation designated the agency as the official travel agent for the convention. The Federation sent out a flyer on the convention to its members. The flyer listed the travel agency as its official travel agency and provided directions on how to use the agency's services. The flyer was sent to Federation members and selected state legislators in the western states. Persons attending the convention were not required to use the agency's services, and many did not. Because of the member's desire to avoid an appearance of her soliciting state business, she provided Washington legislators using the agency's services with a special low rate and the agency did not take any commissions on the travel arrangements provided for them. These savings were passed on to Washington State as the state paid the members' travel expenses. The agency did not make any profit from its travel services provided to the Washington*

legislators.

Type Two Transactions: *In 1990, the ranking member of the LTC from each caucus, a representative of the Governor's Office, and the secretary of the Department of Transportation were invited to participate in a briefing session with the state's congressional delegation at which they were to make formal presentations on how Washington funded its highway projects. The purpose of the briefing was to help prepare the delegation on how they could assist the state in the development of a new surface transportation act.*

The LTC was given the responsibility to make travel arrangements for its members attending the briefing and for the LTC staff who were to coordinate the testimony and review the briefing documentation with the members. It was decided that a staff member should accompany each LTC member on the flights between Seattle and Washington, D.C. and during the flights should brief the LTC member. Because of scheduling conflicts, LTC members were on different flights. Coordination was required to make sure that staff members were on the same flights and seated next to the LTC members they were assigned to brief. Plans were changed a number of times. Further complicating matters was the fact that some of the parties had other conferences to attend after the session with the congressional delegation. The arrangements became very complicated and airfare quotes were quite high. The member's assistance was requested because the LTC was having difficulty achieving workable travel arrangements. The member did not solicit this business.

Due to the complicated nature of the flight arrangements, the agency spent many hours making them. The agency was compensated by the standard ten percent commission that airlines customarily pay travel agencies. The fares paid by the state would not have been lower had another agency handled the business.

Type Three Transactions: *The member's travel agency has been in business for twenty years. In the normal course of day-to-day operation, the agency is contacted by a variety of persons wishing to have travel arrangements made. Some of the agency's clients are known to the member, while others are not. While the agency has not solicited business from any state government department or entity, nonetheless from time to time the agency has made travel arrangements for persons whose fares were paid by a state government department or entity.*

Type Four Transactions: *The member attended a state-approved conference in Washington D.C. The decision to attend the conference was made at the last minute. In her haste, the member made the flight arrangements through her agency. The ticket was written at the state travel rate and the agency was paid the standard ten percent commission. It would have been inconvenient and time-consuming for the member to obtain the services of another agency and doing so would not have resulted in lower fares.*

Type Five Transactions: *From time to time, legislators use the member's agency for travel arrangements. Sometimes the arrangements are for state business and sometimes they are not. The member does not solicit this business. Legislators have contacted her directly for travel arrangements and also have contacted the agency and dealt with agency employees. The member receives the standard commission for making these arrangements and the state does not incur any additional costs by legislators using her agency. The member states that the reason for this business is that people tend to use travel agents they know and trust.*

OPINION

For the reasons discussed in this opinion, the Board concludes that the member's conduct in

the five types of transactions specified in the opinion request would not constitute unethical conduct.

While the Board has issued a number of advisory opinions dealing with members' private business relationships with state executive branch agencies, this is the first time the Board has been asked for an advisory opinion on circumstances involving a member's private business relationships with the legislative branch.

There follows an examination of the Legislative Ethics Act and the Code of Ethics as it applies to the transactions.

Type One Transactions

In deciding advisory opinion requests, the Board is governed by the Legislative Ethics Act, which, in RCW 44.60.010, defines "unethical conduct" as:

. . . any conduct which constitutes a violation of any constitutional provision, statute, rule of the House . . . or joint rule prescribing standards of conduct for legislators. . . .

The Board is not aware of any "standard of conduct" that would forbid the member's conduct in the Type One Transactions, and, therefore, concludes that her conduct here would not be unethical.

Type Two through Five Transactions

Joint Rule 1(a)(2) of the Code of Ethics provides that:

A legislator shall not accept any gratuity or compensation for services rendered in connection with legislative employment other than legislative salary.

This provision is designed to deal with a member's receipt of a gratuity or compensation for the member's exercise of some legislative power, such as voting for or against a bill. The facts in the opinion request do not give the Board any reason to believe that the member would receive the ten percent commission for her exercise of a legislative power. Rather, the facts show that the member would receive the commission for her providing a travel agency service. For this reason, we do not believe these transactions would result in a violation of Rule 1(a)(2).

Joint Rule 1(a)(4) of the Code of Ethics provides that:

A legislator shall not solicit, receive, or accept a gift, favor or service under circumstances where it could be reasonably inferred that such action would influence the legislator in the discharge of legislative duties, or was a reward.

This rule is similar to Rule 1(a)(2), but it is more strict because, unlike Rule 1(a)(2), it will be violated if the circumstances support a reasonable inference that the member will be influenced in the discharge of his or her official duties. The Board finds that this rule is also inapplicable because the member's commission is "compensation" and not a "gift, favor or service" that is the object of this rule.

The Board is aware that Washington State would not incur any increased costs as a result of the transactions dealt with in this opinion and, in fact, may enjoy decreased costs as a result of the Type One and Two Transactions. The Board also recognizes that the member would not solicit legislative travel arrangements and such arrangements would seem to be an incidental and relatively insignificant part of her travel agency business.

In past advisory opinions, the Board has discussed the conflict between the "citizens' legislature" concept and the difficulties members increasingly face in finding employment opportunities outside the Legislature. This opinion is consistent with the Board's previous opinions in which it has been protective of members' employment opportunities.

House Board of Legislative Ethics

Opinion 91-2, August 20, 1991

QUESTION: *The member is the sole owner of a management training and organizational development company. The member has owned this business since 1980, three years before the member's election to the House. The company provides consulting and developmental services throughout the country but primarily in the Northwest. Some of the services deal with the legislative process, others deal with a variety of subjects unrelated to the legislative process. The services are provided to businesses, state and local governments, and nonprofit organizations. The services include employee training programs for management skill building, such as communications skills, planning and budgeting skills, supervisory effectiveness, and team building; and organizational analysis, which includes provision of strategic planning assistance to boards of directors and their management groups.*

Question 1: Is it appropriate under the Legislative Ethics Act for the member's company to focus its employee training services on the legislative process, where:

(1) The training would cover subjects, such as: How a bill becomes law; the role of legislative committees; the roles of staff, lobbyists, legislative leaders, and executive branch officials; how to make effective presentations to legislative committees and to members; and how it is appropriate for participants in the training to influence the passage of bills;

(2) The training would be designed to help employees understand the legislative process in order to become more effective participants in that process. Upon completion of the training program, participants should understand the progression of legislation from inception to enactment; appropriate methods of preparing and presenting bills; appropriate times and ways to influence the course or contents of bills; and how to make effective presentations to legislators and legislative committees;

(3) The company would provide this training under contracts with private organizations and with state and local governments. The company also would be selected by the Department of Personnel to provide the training services to state employees. The selection would occur under the "competitive solicitation" provisions of the Personal Service Contracts Act, Chapter 39.29 RCW. Under the Department's Education and Training program, contracts for training are usually awarded on a competitive basis by the Department, and once an instructor is selected to provide training services, other state agencies may elect to use that instructor without further competitive selection. The company would be selected by other state agencies exercising this election;

(4) The member would serve as the course instructor; and

(5) In training programs of sufficient length and to provide for a balanced perspective on the issues discussed, resource persons - such as members, legislative staff, and lobbyists - would make brief presentations to the participants.

Question 2: Is it appropriate under the Legislative Ethics Act if the member's company contracts with a state agency for the provision of training services while at the same time the member serves on the House Appropriations Committee?

OPINION

The answer to both questions is that the Legislative Ethics Act, except in the situations specified in this opinion, would not bar a member from providing the business services described in the questions.

The questions presented here deal essentially with whether a member can operate a training business in which the member provides "legislative process" training designed to make the trainees "effective participants in that process." The Legislature, during the 1991 Regular Session, amended the Code of Ethics to bar members from accepting honoraria under certain circumstances. New Joint Rule 1(a)(3) provides that:

A legislator shall not accept an honorarium if it can be reasonably concluded that the honorarium would not have been made but for the legislator's status as a legislator.

The Board is aware that honoraria granted to members of legislative bodies are typically granted for the members' speeches about legislative matters. See: Advisory Opinion 1989 - No. 3. This new bar against honoraria is reflective of the Legislature's increasing concern over the negative impact that appearances of conflict of interest have on the Legislature as an institution. In rendering this opinion, we have been influenced by the honoraria amendment and the Legislature's concern over appearances of conflict of interest.

There follows a discussion of the standards of ethics which one might argue are germane to the questions presented.

1. Joint Rules 1(b)(2) and 1(a)(5)

This rule and statute provide as follows:

Joint Rule 1(b)(2): "A legislator . . . shall not use or attempt to use improper means to influence a state agency. . . ."

RCW 42.21.030: "No public official shall use his position to secure special privileges or exemptions for himself."

The Board's opinions under these provisions generally authorize members' business relationships with state agencies, but with the recommendation that the members take care to avoid any contacts with state employees that might lead one to believe that the members are using their legislative positions in order to influence state officials or employees. These opinions are based on the Board's recognition of the private employment needs of persons serving in Washington's part-time Legislature. See: Advisory Opinion 1991 - No. 1 and opinions cited therein.

The circumstances in this case do not reveal that the member would exercise the kind of undue influence which these provisions are designed to prevent. The Board has no reason to believe that the member would use his or her legislative status in order to obtain special treatment from any state agency. Therefore, consistent with its previous opinions, the Board concludes that the circumstances specified in this opinion request would not violate these provisions.

With respect to Question No. 2, the Board notes that hypothetical questions frequently specify members' positions on legislative committees. See: Advisory Opinions 1985 - Nos. 1 and 2; 1987 - No. 1; 1989 - Nos. 2 and 3; 1990 - No. 1; and 1991 - No. 1. These opinions show that committee membership is a fact that the Board will consider in responding to an advisory opinion request. Consistent with them, absent any attempt by the member to use his or her committee membership to obtain special treatment from a state agency, the Board does not find it inappropriate under Joint Rule 1(b)(2) and RCW 42.21.030 for the member to have a contract with a state agency while serving on the Appropriations Committee.

2. Joint Rules 1(a)(2)

In this advisory opinion request, the member, through the member's company, would receive compensation for the company's provision of the "legislative process" training. This arrangement may be questioned under Joint Rule 1(a)(2), which provides as follows:

A legislator shall not accept any . . . compensation for services rendered in connection with legislative employment other than legislative salary.

Recently, in Advisory Opinion 1991 - No. 1, the Board interpreted this rule as not preventing a member from providing travel agency services, for compensation, for the official travel of legislators, legislative staff, and public officials and employees. The Board stated that:

This provision is designed to deal with a member's receipt of . . . compensation for the member's exercise of some legislative power, such as voting for or against a bill. The facts in the opinion request do not give the Board any reason to believe the member would receive . . . (compensation) for the exercise of a legislative power. Rather, the facts show that the member would receive . . . (compensation) for her providing a travel agency service.

The circumstances specified in the question presented in this opinion request reveal that the member's compensation would be for training services and not for "exercise of some legislative power." Therefore, consistent with Advisory Opinion 1991 - No. 1, the Board concludes here that Joint Rule 1(a)(2) would not prevent the circumstances.

3. Joint Rule 1(a)(5)

This rule provides as follows:

A legislator shall not solicit, receive, or accept a gift, favor or service under circumstances where it could be reasonably inferred that such action would influence the legislator in the discharge of legislative duties, or was a reward.

In Advisory Opinion 1991 - No. 1, the Board concluded that "compensation" was not prevented by this rule because the rule prevents soliciting or receiving "a gift, favor or service." Consistent with that opinion, the Board concludes here that the rule would not prevent the member from accepting compensation for the training services.

However, the Board believes that the rule would prevent the member from using a House employee as part of the training curriculum. This is so because, first, the employee's participation would constitute "a gift, favor or service" to the member which the member would "solicit, receive, or accept"; and, second, "it could be reasonably inferred that" the employee's positive response to the solicitation would influence the member in the member's discharge of legislative duties with respect to the employee. In today's Legislature, the use and supervision of legislative employees have become

increasingly important parts of each legislator's responsibilities. It is significant that legislative employees are not covered by civil service protections and their employment may be terminated at will.

The Board notes that this advice against the member's use of employees in the training curriculum should not be interpreted as barring a member who is a public school teacher or college or university professor from asking an employee to make a guest appearance in the member's classroom. In those situations, an employee's participation would appear to be of minimal significance to the member as it would be very unlikely to have any effect on the member's compensation or employment as a faculty member. For this reason, the Board believes that this kind of participation by a legislative employee would not be violative of Rule 1(a)(5).

4. Joint Rule 1(a)(6)

This rule provides that:

A legislator shall not accept any remuneration other than legislative compensation for legislative advice or assistance.

In applying this rule to the questions presented here the Board must consider the rule's purpose to prevent corruption or the threat of corruption, as well as members' needs to earn a living in our part-time legislature.

In Advisory Opinion 1981 - No. 2, the Board held that a member should not represent private printers in their negotiations with the Washington State Department of Printing to procure printing contracts with the Department. The Board concluded that the question presented there gave rise to an appearance of "undue influence" which the Board found would violate Rule 1(b)(2), prohibiting a member from using "improper means to influence a state agency." This 1981 opinion is germane for two reasons: First, because the Board found there that the contemplated "arrangement would produce circumstances particularly conducive to the exercise of the kind of 'improper means' prohibited under the . . . rule." Second, because the member did not provide any information to the Board to rebut the appearance of "undue influence." Such information would include information showing, among other things, that the member had "particular expertise" in performing that kind of work.

Similar to Advisory Opinion 1981 - No. 2, the Board finds here that a member's contracting for the provision of legislative process training can create "circumstances particularly conducive to" unethical conduct, especially with respect to Rule 1(a)(6). For this reason, the Board concludes that this rule will be violated if the member cannot show that he or she has "particular expertise" in providing this training. Moreover, the Board believes that the member should be able to show that the expertise was largely acquired while the member was not a legislator.

In addition, we believe that the rule prevents a member from providing legislative assistance for pay (other than legislative compensation) if the assistance is directed toward any anticipated or pending legislative measure and is designed to assist the recipient obtain a favorable outcome with respect to that measure. Thus, for example, a member should not accept remuneration for assisting an agency or lobbyist to promote the passage, or defeat, of a bill to provide for a new state program. (On the other hand, under this construction of the rule, a member who is a high school teacher should not be barred under the rule from teaching a civics course dealing with the legislative process. Obviously the member would not receive pay for helping students obtain a particular legislative agenda.)

Conclusion

Subject to the following advice and exceptions, the Legislative Ethics Act does not prevent the member from providing, or contracting to provide, the legislative process training specified in this opinion request:

1. The member should take care to avoid any private business contacts that might give rise to a belief that the member is using his or her legislative status to obtain special treatment from state officers or employees.
2. The member should not use House employees in the training curriculum.
3. The member should have expertise to provide this training and the expertise should have been largely acquired while the member was not a legislator.
4. The member should not provide training services that deal with an anticipated or pending legislative measure and that are designed to assist the recipient of the services in procuring a favorable result with respect to that measure.

This opinion resolves issues not previously considered by the Board. For this reason, the Board's advice in paragraphs 1 through 3 above is prospective only and does not apply to any services previously provided or any services required to be provided under an existing contract.

HOUSE BOARD OF LEGISLATIVE ETHICS

Opinion 94-2, April 1, 1994

QUESTION

Would a member engage in unethical conduct under the following circumstances:

(1) The member introduces and actively promotes a bill dealing with extraterritorial land use regulations by cities. The background of the bill is as follows: Many cities provide utility services outside their municipal boundaries. With respect to these cities, the bill generally would prevent them from denying utility services to outside developments where the reason for the denial is that the developments do not conform to the cities' land use restrictions. The member promotes this bill because the member believes that cities have no authority to unilaterally extend their land use regulations outside their boundaries and that such regulations are wrong and violative of property rights, as well as state growth management policies, and place property owners in a predicament of having to deal with two separate governments with inconsistent land use regulations;

(2) The member is an attorney with a private practice. The need for this bill comes to the member's attention while representing a developer client whose subdivision application was adversely affected by a city's extraterritorial land use regulations. Based on the client's advice as well as the member's contacts with the city attorney's office, the member believes that the dispute between his client and the city is over. Both the member and client are satisfied that the client has prevailed. However, because of the member's strong feelings on the issues involved, the member believes new legislation is needed to make it clear that municipal land use policies along the lines of the city's are not authorized under Washington law. It is in this context that the member

introduces the bill;

(3) Subsequent to the member's introduction and promotion of the bill, the member discovers that there still is some doubt on whether the client's dispute with the city is over. This factor leads the member to question whether his activities with respect to the bill were in compliance with the Code of Legislative Ethics. In order to deal with this question, the member sponsors, and the House adopts, an amendment to the bill that would result in the bill not applying to the dispute, if any, between his client and the city;

(4) It is estimated that there are at least ten cities within Western Washington that have adopted extraterritorial land use policies of the type that the bill would prevent. There are many developers who are affected by such policies. The member is one of a large number of attorneys with developer clients who are affected by them;

(5) In the course of promoting this bill, the member never disguises that the bill was prompted by his experiences representing a client. To the contrary, the member notes these experiences in arguing for the bill. The member believes that, as a citizen legislator, he should rely on his experiences as a practicing lawyer in carrying out his legislative responsibilities. In particular, he believes that if in his practice of law he observes unfair activities being carried out under the color of law, then it should be expected that he will look toward a legislative solution as a means to ending the unfair activities;

(6) The member has a longterm retainer agreement with this client. The agreement has been in effect for longer than four years, without any change in the retainer amount. The member's compensation for representing this client is not affected by his introduction and promotion of this bill?

OPINION

The Board finds that the facts in this opinion request do not show that the member would engage in unethical conduct. However, the Board has serious reservations that the conduct would not be above question and would appear to members of the public as a conflict of interest that should have been avoided. The Board is also aware that the circumstances generally described in this request, while stated in the hypothetical, unfortunately have already occurred.

Joint Rules 2 and 3 of the *Code of Legislative Ethics* provide as follows:

Rule 2. A legislator has a personal interest which is in conflict with the proper discharge of legislative duties if the legislator has reason to believe or expect that a direct monetary gain or a direct monetary loss will be derived by reason of the legislator's official activity.

However, a legislator does not have a personal interest which is in conflict with the proper discharge of legislative duties if no benefit or detriment accrues to the legislator as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation, or group.

...

Rule 3. . . . A legislator shall not vote on or influence legislation in committee or on the floor of either house, where the legislator has a personal interest which is in conflict with the proper discharge of legislative duties.

In applying these rules to the facts provided in the opinion request, the Board must decide the threshold question of whether the member has "reason to believe or expect" that he would derive a "direct monetary gain" by his promotional activities? If the answer is "no," then the member would not violate the rules. The facts provided show that the member believed his client's legal dispute was finished. They do not show that this belief was unreasonable. More importantly, the facts show that the member's compensation from the client would not be affected by the promotional activities. Under the facts provided, the answer to the threshold question can only be "no." For the Board to conclude otherwise would amount to the Board's re-writing the facts to support its conclusion.

Joint Rule 6 of the *Code of Legislative Ethics* provides that a member:

shall not accept any remuneration other than legislative compensation for legislative advice or assistance.

Because the facts provided show that the member's compensation "is not affected" by his promoting the bill, the Board also must conclude that Joint Rule 6 would not be violated.

The Board is aware that it is frequently difficult to know whether or when a legal dispute is actually over. That the dispute here was not really finished when the member thought it was, probably tends to substantiate this point. Members should conduct themselves in a manner that does not create public mistrust in the Legislature. The Board believes that members of the public generally would perceive the conduct described in the opinion request as an attorney-member inappropriately using his legislative position to promote his client's interests. To prevent this public mistrust and to reduce the risk of violating Joint Rules 2, 3, and 6, the Board advises that, in the future, the member should avoid promoting legislation if there is any reason to believe that the legislation might benefit the member's client by determining or influencing the outcome of a legal dispute in which he has represented the client.

The facts in this opinion request show that when the member discovers the dispute may not be over with, he successfully amends the bill to prevent it from applying to the dispute. The Board believes this conduct to be commendable. The Board has issued a number of opinions where it has advised members to take precautionary measures designed to reduce the risk or appearance of unethical conduct. See: *Advisory Opinions 1990 - No. 1; 1987 - No. 1; 1985 - No. 2; and 1985 - No. 1*. The remedial measure described here would seem consistent with the advice in these opinions.